No. 475.
Brief of Vocke for Appellee
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IN THE

Supreme Court of the United States.

GERHARD TERLINDEN, *Appellant,*
vs.
JOHN C. AMES, UNITED STATES MARSHAL, *Appellee.*

No. 475

Appeal from District Court of the United States for the Northern District of Illinois.

BRIEF.

WILLIAM VOCKE AND
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ATTORNEYS FOR APPELLEE.

VOCKE & HEALY,
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BARNARD & MILLER PRESS, CHICAGO.

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Supreme Court of the United States.

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vs.

JOHN C. AMES, UNITED STATES MARSHAL, *Appellee.*

Appeal from District Court of the United States for the Northern District of Illinois.

BRIEF.

MAY IT PLEASE THE COURT:

The appeal in this case was first prosecuted by appellant to the Circuit Court of Appeals for the Seventh Circuit, but dismissed upon our motion for the reason that it involved the validity of a treaty and was therefore not cognizable by said court under the provisions of Sections 5 and 6 of the Act establishing the United States Circuit Courts of Appeals. Before the motion was decided, counsel for appellant had prepared and filed their briefs and arguments upon the several errors assigned by them, but they utterly failed to give a correct synopsis of the facts and pleadings in the case as presented by the record. Their brief presented here has not been accessible to us in the preparation of our work, and fearing that a clear and satisfactory recital of the vital points disclosed by the record may be again omitted by them, we beg to avail ourselves of the privilege extended to us by Section 3 of Rule 21 of this Honorable Court and preface our brief with the following

STATEMENT OF THE CASE.

On the 15th of August, A. D. 1901, Dr. jur. Walther Wever, Imperial German Consul at Chicago, and the duly accredited official agent of the Kingdom of Prussia, appeared before Mark A. Foote, Esq., a commissioner of the United States of America in and for the Northern District of Illinois, and specially authorized to issue warrants for the apprehension of fugitives from the justice of foreign governments, and filed his complaint under oath charging in substance that one Gerhard Terlinden, *alias* Theodor Graefe, a subject of the Kingdom of Prussia, did, within the first six months of the year 1901, within the jurisdiction of said kingdom, commit various crimes of forgery, counterfeiting and the utterance of forged papers, chiefly in this, that as a director of the Gerhard Terlinden Stock Company, organized and doing business in said kingdom, said Gerhard Terlinden, *alias* Theodor Graefe, forged and counterfeited a large number of certificates of stock of said company amounting to about a million and a half of marks, German money, equal to about $375,000 of American currency, and put off, uttered and disposed of the same to Robert Suermont of the city of Aachen, in Prussia, to the Amsterdamsche Bank at Amsterdam, Holland, to the Disconto Gesellschaft, a corporation at Berlin, Prussia, and to others, with felonious intent to cheat and defraud said several persons and corporations.

The complaint further charges that said Gerhard Terlinden, *alias* Theodor Graefe, was at the time of committing said several crimes a resident and citizen of the King-

dom of Prussia; that he is a fugitive from the justice of said kingdom; that about July last he fled into the jurisdiction of the United States of America for the purpose of seeking an asylum therein; that he is said to be concealed within the Northern District of Illinois or in the Eastern District of Wisconsin, and that the crimes with which he is charged are crimes embraced within the treaty of extradition between the United States of America and the Kingdom of Prussia concluded on the 16th of June, 1852, and ratified May 31, 1853.

The complainant therefore prays that a warrant be issued for the apprehension and commitment of the said Gerhard Terlinden, *alias* Theodor Graefe,

> "in order that the evidence of his criminality may be inquired into, and the said Gerhard Terlinden, *alias* Theodor Graefe, may be extradited and delivered up to the justice of the said Kingdom of Prussia, in accordance with the stipulations of said treaty and the acts of Congress passed in pursuance thereof." (Rec., p. 6.)

The commissioner accordingly issued his warrant, which was placed in the hands of John C. Ames, United States marshal in and for the Northern District of Illinois (Rec., p. 7), and the fugitive was thereupon apprehended in the Eastern District of Wisconsin and brought into the Northern District of Illinois to be arraigned and dealt with as provided by law.

Before any evidence was heard under said complaint the said Walther Wever, in his capacity as German Consul and duly authorized representative of the Kingdom of Prussia, having meanwhile been more specifically advised by the depositions of several witnesses taken in the court of competent jurisdiction in Prussia, in which the criminal prosecution against said Gerhard Terlinden, *alias*

Theodor Graefe, is pending, that the several crimes with which said fugitive is charged were much more extensive and enormous than at first reported, and deeming it necessary in furtherance of justice, that the commissioner should take cognizance of all of said charges, submitted to said officer on the 25th of September last another complaint charging minutely in a number of specific counts (Rec., pp. 8-19):

1. The forging of a large number of stock certificates of the Gerhard Terlinden Stock Company or causing these forgeries to be committed.

2. Uttering said stock certificates, well knowing them to be forged or causing this to be done.

3. Forging and counterfeiting the steel stamp of the Royal Prussian Revenue Office at Duisburg, Prussia, or causing this to be done.

4. Imprinting said forged steel stamp upon said forged certificates of stock so as to make it appear that the tax required by the Prussian revenue laws to be paid upon certificates issued by stock companies in said kingdom had been duly paid and thus to give said forged certificates the appearance of genuine ones, or causing this to be done.

5. Uttering forged certificates of stock with said forged revenue stamp imprinted thereon, or causing this to be done.

6. Forging the acceptance of one Heinrich Schulte to a certain draft for 9,582.35 marks and uttering the same, or causing the acceptance to be forged and the forged draft to be uttered.

7. Forging the acceptance of one Wilhelm Seven to two certain drafts for 26,250 and 25,912.45 marks,

respectively, and uttering the same, or causing this to be done, etc., etc., all "contrary to the laws of the Kingdom of Prussia."

We beg leave to call particular attention to the several counts relating to the forgery and the utterance of the stock certificates in which it is minutely recited that in one case the said Terlinden, *alias* Graefe,

> "falsely made, forged and counterfeited 400 certain instruments purporting to be genuine stock certificates of the Gerhard Terlinden Stock Company, each of the face value of 1,000 marks, and uttered the same, etc., etc., with intent to cheat and defraud the Disconto Gesellschaft of Berlin"—etc.

In the other that he

> "falsely made, etc., 133 certain other such certificates, each of the face value of one thousand marks, German coin, anl uttered them with the intent to cheat and defraud the Amsterdamsche Bank," etc., etc.

All these acts are charged in the several counts of the complaint as distinct forgeries, wholly separate and apart from the forging of the royal Prussian revenue stamp and the imprinting of the same upon forged certificates. The forgery of the stamp is set forth in later counts and constitutes a wholly different charge.

We are moved to submit these considerations to the court by the fact that counsel for the appellant in their printed briefs submitted to the court below made the following wholly unwarranted statements:

> "It appears that the forgery (of the stock certificates) consisted wholly and exclusively in affixing to said certificates the impression of a steel stamp and the signatures were all genuine, the endorsement of their entry in the stock book was genuine."

We are not sure but that said statements may be repeated in this Honorable Court.

The form of the stock certificates which appellant is charged with having forged appears upon record page 39. This shows that they bore, besides his own, the signature of another officer of the corporation, Winterberg by name, and the charges in the complaints, therefore, not only involved the forgery of the consecutive number stamped upon each one of the false certificates, to give them the appearance of the genuine ones bearing the corresponding number, but also that of the signature of said officer. It is also in evidence that there was no entry of this forged stock made on the stock book, but that this book disappeared when Terlinden fled.

Upon the second complaint filed by the consul as aforesaid and showing likewise that the crimes charged were committed within the jurisdiction of the kingdom of Prussia, also that the fugitive was at the time of committing the same a subject of said kingdom, the commissioner, in accordance with the prayer of said complaint, issued another warrant, which was served upon the appellant on the following day, to wit: on the 26th of September, whereupon the proceedings under the former warrant were dismissed.

On the 19th day of October, 1901, the German Consul, having meanwhile received additional advices through his government as to still further crimes of a similar nature committed by said fugitive, filed another complaint before said commissioner, charging specifically the forgery of 500 and of 200 certificates of stock of the Gerhard Terlinden Stock Company, each of the face value of 1,000 marks, German coin, and the utterance of the same by the

said Gerhard Terlinden to Robert Suermont of the city of Aachen, and to the Norddeutsche Bank of Hamburg, respectively. This was also some time before the hearing of the case took place. This third complaint does not appear in the record for reasons which will hereinafter be pointed out.

On the 17th of October last, before any evidence was taken before the commissioner, appellant presented to the District Court of the United States for the Northern District of Illinois his petition praying for a writ of *habeas corpus* upon the following grounds (Rec., p. 3):

1. No treaty or convention for the extradition of fugitives from justice exists between the United States and the German Empire.

2. The treaty or convention for the extradition of fugitives from justice concluded between the United States and the kingdom of Prussia on the 16th of June, 1852, was terminated by the creation of the German Empire, and the adoption of the German constitution in 1871.

3. The complaint filed before the commissioner does not charge an extraditable offense under the provisions of said treaty. (This refers to the second complaint as will appear from the record later on.)

4. The petitioner is not guilty of any extraditable offense under the provisions of said treaty, were the same still in force and of binding effect.

5. All proceedings had or attempted to be had before the commissioner under said complaint and warrant are illegal, void and without authority of law, because the commissioner did not have jurisdiction over the person of the petitioner.

The writ being issued the marshal of the Northern District of Illinois filed his return on the 21st of October setting forth in substance that he

"arrested said petitioner within said district on the 26th day of September, 1901, upon a warrant duly issued by Mark A. Foote, a United States Commis-

sioner specially appointed and authorized, etc., which said warrant was duly issued by said commissioner upon the complaint of Walther Wever, Imperial German Consul at Chicago, as representative of the kingdom of Prussia, charging said Gerhard Terlinden, who falsely assumed in this country the name of Theodor Graefe, with having, as a subject of the kingdom of Prussia and within the jurisdiction of the said kingdom, committed the crimes of forgery, counterfeiting and the utterance of forged instruments, and with being a fugitive from the justice of said kingdom of Prussia," etc.

On said 21st of October the petition for the writ was brought up for hearing and "after arguments of counsel the court not being now fully advised in the premises," it was:

"Ordered that this matter be further submitted to the court on briefs to be filed in five days and that this matter be set down for further hearing on October 28, A. D. 1901, at ten o'clock A. M." (Rec., p. 26.)

On the day last aforesaid

"the matter coming on to be heard on the return of the marshal to the writ of *habeas corpus:* It is ordered that the hearing of said matter be and the same is continued until to-morrow morning at ten o'clock." (Rec., p. 26.)

On that same day the relator's counsel, without any notice whatever to the marshal or his attorneys, placed on file with the clerk of the court an instrument which they call a traverse, but which, without questioning any of the facts charged in the marshal's return, contains a lot of matter all of which is wholly irrelevant to the issues. Said "traverse," presented under the oath of Gerhard Terlinden, recites substantially as follows (Rec., p. 27):

"That on the 26th of September, 1901, a complaint was filed with Mark A. Foote, United States commissioner, etc., upon which a warrant was issued

and the relator arrested; that with said complaint there were filed copies of the original testimony, etc., taken before certain court officers in the Empire of Germany relative to the alleged offenses with which he is charged, with English translation thereof,"

and then setting forth that the complaint refers to said depositions in express language the "traverse" recites from the complaint the following passages in relation thereto:

> "And the undersigned herewith submits to the commissioner and files with this complaint a copy of all depositions of witnesses taken in said matter, *together with a copy of the warrant of arrest issued by said court against the said Gerhard Terlinden, alias Theodor Graefe, and of the provisions of the penal code of the German Empire applicable to said several crimes and providing punishment therefor.*"

The relator then proceeds to state in his sworn "traverse":

> "That the provisions of the Criminal Code applicable to the facts and circumstances of this case as shown by the evidence hereto annexed are Sections 240, 47, 49, first paragraph; Section 360, fourth and fifth paragraphs; Section 275 and Section 56 of the Code of Criminal Procedure, also Section 234 of the Civil Code, a correct translation of which are hereto annexed and made a part hereof, etc.; that said depositions do not show that the petitioner is guilty of an extraditable offense; that a copy thereof is filed with said traverse; and petitioner therefore prays that the return of the marshal be dismissed and that he be discharged."

No attempt whatever is made to show how and where the relator acquired his competency to testify as to what are the provisions of the penal or civil code of the German Empire applicable to his case, but in their effort to supply this omission counsel file with the "traverse" the

affidavit of one Oscar Heinrich of Milwaukee, (Rec., p. 30), setting forth in substance

> "that he studied law in Germany; that he is familiar with the constitution, civil and penal codes of the German Empire now in force; that he understands German and English; that he has made the annexed translations of certain sections and parts of sections of the German Constitution and of the German civil and penal codes (the court will find that not a single one of the sections of the German Constitution is annexed); that said translations are correct, and that *the translations hereto annexed are the translations of the official and authentic provisions of the Constitution, civil and penal code of the German Empire, as they now exist, indicated by the number of the article, or section, etc., as identified by the proper reference found at the beginning of each article or section,*" etc.

This "expert" does not bear out the petitioner that what he claims to quote from the "German Constitution and the civil and penal codes" is all the law applicable to his case. but even if he did we submit that courts of justice have never yet permitted foreign laws to be proven as is here attempted to be done.

But the question is pertinent: What was the object in making this attempt? According to the relator's own admission made in this "traverse" the warrant of arrest issued by the German court in which he is called upon to answer for the crimes with which he is charged contained all the advice he needed on the subject of the laws applicable to his case. He found the warrant attached to the depositions and it requires no assurance that the genuineness of the laws quoted therein as well as their applicability to his case, were properly and legally authenticated to be available at the hearing before the commissioner. Upon examination of the rec-

ord the court will find, however, that, while the relator files with his "traverse" what he claims to be a copy of the depositions filed with the commissioner in support of the complaint he does not bring into court the warrant of the German judge and the provisions of the German law therein contained, but suppresses them.

(In order to avoid recurring to this topic in the discussion of the law involved in this case, we will briefly insert right here, however, that under the rules the traverse in a case of this character concludes the pleadings, and the allegations it contains, even if relevant, are treated by the courts as denied by the respondent without the requirement of a formal rejoinder.

Leary's case, 6th Abb. n. c. (N. Y.), 43.
U. S. v. Williamson, 3 Am. L. Reg., 729.)

Although the relator, according to his own showing, had it as much in his power to submit a copy of the German warrant with the provisions of the German penal code therein contained as to file with his "traverse" a copy of the depositions to which the warrant was attached, he nevertheless came into court on the said 29th of October, to which day the cause had been continued, and presented his petition for a writ of *certiorari* upon the following grounds (Rec., p. 54), to wit:

> "First. That there are on file before the commissioner the original complaint and warrant upon which petitioner was apprehended, and also the amended complaint and new warrant upon which he was arrested; that with said amended complaint filed with said commissioner on the 26th of September, 1901, there were filed certain depositions taken in Germany, which said depositions likewise contained copies of various provisions of the German Criminal Code, alleged to have been violated; that said depositions

also contained a copy of the original warrants issued by the German courts; that *said depositions and said copies of the provisions of the German Criminal Code and the copy of said original warrant were specifically identified and referred to by said amended complaint filed as aforesaid.*

Second. That the petitioner has alleged as one of the causes of the illegality of his restraint that the amended complaint in question does not allege an extraditable offense; that in order to determine the sufficiency of the complaint as affecting the jurisdiction of the commissioner, it is necessary to have before this court the provisions of the German law filed as heretofore set forth in this petition, and also a copy of the original warrant issued by the courts of the German Empire.

Third. That in order fully to determine the questions raised by petitioner's petition herein as to whether there exists a treaty between the government of the United States and the German Empire for the extradition of persons charged with the offenses alleged in said warrant issued by the court of the German Empire, it is necessary to have the depositions, provisions of the German Criminal Code and copy of the original warrant issued by said German court.

Wherefore petitioner prays that the court may issue a writ of *certiorari*, ordering the said Mark A. Foote, Esq., United States commissioner, to certify to this court the records herein referred to and in his possession at the time the writ of *habeas corpus* was issued," etc.

Signed and sworn to by Gerhard Terlinden.

The court on reading and considering said petition and hearing arguments of counsel took the matter under further advisement (Rec., p. 56), adjourned it until the 31st of October, 1901, and on said day, denying the petition for a writ of *certiorari*, further ordered (Rec., p. 56) as follows, to wit:

"That the question of whether since the formation of the German Empire the extradition treaty con-

cluded between the government of the United States and the Kingdom of Prussia in 1852 is still in force or abrogated by the constitution of the German Empire, be submitted to the court on briefs to be filed by the relator on November 2, 1901, at ten o'clock A. M. and reply brief by Monday, November 4, 1901, at ten o'clock A. M., and the further hearing of this matter is continued until Tuesday, November 5, at ten o'clock A. M. It is further ordered that said relator be remanded to the custody of the marshal *and that the motion to stay all further proceedings before the United States commissioner be and the same hereby is denied.*"

And afterwards, to wit: on the 5th day of November, A. D. 1901, the following order was entered in said cause, to wit:

"This cause coming on to be heard on the petition filed herein, the return of the marshal to the writ of *habeas corpus* and the traverse of the relator, comes the petitioner by Albert W. May, Esq., his attorney, and in custody of the marshal and comes also John C. Ames, the marshal for this district, the respondent herein, by William Vocke, Esq., his attorney. Thereupon the court having heard the arguments of counsel for the petitioner and for said respondent and being fully advised in the premises, finds that said petitioner is lawfully restrained from his liberty. It is thereupon ordered, etc., that the petition in this cause be and the same hereby is dismissed and that said petitioner Gerhard Terlinden be and he hereby is remanded to the custody of said marshal, and that said petitioner pay the costs of this proceeding, to which ruling of the court said petitioner by his counsel duly excepts, and on his motion for an appeal from said ruling it is ordered, etc., that the amount of the appeal bond herein be and the same hereby is fixed at the sum of five hundred dollars." (Rec., p. 57.)

Petitioner's counsel thereupon perfected an appeal to the United States Circuit Court of Appeals for the

Seventh Circuit (Rec., p. 60) and assigned therein the following errors:

1. The court erred in declining to hold that no treaty exists between the United States of America on the one part and the Kingdom of Prussia or the German Empire on the other.

2. The court erred in holding that the question of the existence of a treaty must be determined by the political department of our government and was not within the province of the court to decide.

3. The court erred in discharging the writ of *habeas corpus*, thereby holding the existence of a treaty between the United States of America on the one part, and the Kingdom of Prussia or the German Empire on the other part.

4. The court erred in denying the right to introduce evidence for the purpose of showing that no extraditable offense has been committed.

5. The court erred in denying a prayer for a writ of *certiorari* in aid of the writ of *habeas corpus* heretofore issued, to bring the record from the United States commissioner to the District Court aforesaid.

6. The court erred in holding that the record before this court shows the commission of an extraditable offense.

THE LAW OF THE CASE.

In presenting the law of the case we are first confronted with the question:

Is the extradition treaty with Prussia still in existence or not?

In meeting this as well as any of the other errors assigned we are not in a position to follow the invariable course of preparing a formal answer, because, having had no access to their brief, we do not know in what manner counsel will now present the subject. We assume, therefore, that they will rely substantially upon the same elaborate arguments which they presented both in the District Court and in the Circuit Court of Appeals. There the question raised by counsel as to the validity of the extradition treaty of June 16, 1852, is placed in the foreground, and it is, indeed, the gist of the whole case, because, if this court should hold that the treaty is invalid, then the consideration of any of the other questions raised by counsel would become unnecessary, since it is freely conceded that appellant's extradition can only be effected by means of that treaty.

In their efforts to show that this treaty has become invalid by the creation of the German Empire in 1871 counsel argue substantially as follows:

> "The sovereignty over the Kingdom of Prussia is vested in the German Empire. The power of making treaties is vested solely in the sovereignty of independent nations, therefore, in order that extradition can be considered at all, an extradition treaty must exist between the United States and the German Empire, which is not the case. The treaty

of 1852 included most of the German States, but Baden and Bavaria had separate treaties, and with Lubeck, Hamburg and Alsace-Lorraine no treaty was ever made, nor did they accede to the treaty of 1852.

"Treaties are contracts between two or more sovereign states and obligatory upon nations as private contracts are upon individuals, subject to the same rules of construction as these.

"Extradition treaties are personal contracts calling for the reciprocal personal service of the contracting parties. The compliance with such provisions depends entirely upon the continued sovereign existence of both contracting parties. When sovereignty dies the treaty cannot be executed, but it is terminated. Personal executory contracts are terminated by the death of one of the contracting parties. Thus, also, if one of the contracting nations ceases to exist and its share of duties can no longer be performed, its treaties with the nations are terminated. According to international law the obligations of treaties expire in case either of the contracting parties loses its existence as an independent state, or in case its internal constitution is so changed as to render the treaty inapplicable to the new condition of things. Hence, if Prussia ceased to exist as an independent state the extradition treaty entered into with the United States in 1852 is terminated. If Prussia cannot now exercise all powers of independent sovereignty, *i. e.*, 'declare war, make peace, suppress insurrection, repel invasion, coin money, regulate foreign commerce and the admission to citizenship, *as well as to make treaties*,' then all her former treaties with foreign powers are *ipso facto* terminated. All this, counsel say, was effected by the formation of the German Empire, as shown by the preamble of its constitution and especially the following provisions contained in Art. 3 of that instrument, which [in George Bancroft's translation, to which reference will hereinafter be made more fully] reads as follows:

"'No German shall be limited in the exercise of

this privilege (the privilege of citizenship theretofore defined) by the authorities of his native state or by the authorities of any other state of the confederation.'

"The regulations concerning the care of paupers and their admission into the various parishes are not affected by the principle enunciated in the first paragraph.

"In like manner those treaties shall remain in force which have been concluded between the various states of the federation in relation to the custody of persons who are to be banished, the care of sick and the burial of deceased citizens.

"This, counsel say, makes it 'clear that the German constitution abrogated all existing treaties between the several states and other nations.' That this was the intent of the constitution, counsel insist, is very evident from that provision. 'The empire did not intend to endorse such treaties and consequently abrogated them.'

"The German emperor must represent the empire in international affairs, enter into alliances and other treaties with foreign nations and commission and receive embassadors. All powers incident to the sovereignty of an independent nation are lodged in the imperial government and the separate states are distinctly prohibited from exercising them. This includes Prussia, and since she can no longer make treaties her former treaties are void.

"The German states, counsel argue, therefore, are under precisely the same restraint with reference to the power of making treaties as the states of the American Union, and this being the case, it follows, in counsel's opinion, that all the old treaties must fail."

"The only treaty in question is that of 1852 and a number of other German states besides Prussia declared their accession to the same. Counsel ask: Can any person be extradited under said treaty who flees from one of those states who did not accede to it? The Kingdom of Wurtemberg is one of the states who did not become a party to the treaty. In

1866 the old German confederation was dissolved. In that same year a naturalization treaty was concluded between the United States of America and that kingdom and it was therein, among other things, provided:

"'The convention for the mutual delivery of criminals, fugitives from justice, in certain cases, concluded between the contracting parties the 16th of June, 1852, etc., remains in force without change.'"

Counsel, quoting this provision, say in all seriousness that by the same

"our own government, as well as that of Wurtemberg, treated the collapse of the German confederation as abrogating the treaty of 1852, claiming as counsel do, that the term 'remain' means 'revive' or 'renew.'"

From all this it appears to counsel that the treaty with Prussia

"is as much terminated as if Prussia had become a part of Great Britain in 1871."

They proceed:

"The North German Union was formed in 1867. The treaty of 1852 included twenty-seven German states and twenty-one of these were embraced within the North German Union. In 1868 the naturalization treaty was concluded between the government of the United States and the North German Union, and this contains the following provision:

"'The convention for the mutual delivery of criminals, fugitives from justice in certain cases, concluded between the United States on the one part and Prussia and other states of Germany on the other part on the 16th day of June, 1852, *is hereby extended to all the states of the North German Confederation.*'"

This, to counsel's mind, also clearly shows that the high contracting parties treated the extradition treaty as abrogated, for, why, counsel ask, was it necessary to renew its provisions?

Counsel then cite a number of cases to show that the political department of the government of the United States has at various times declared certain of its treaties with foreign states abrogated on account of their absorption by others, thus the treaty with Algiers, which was terminated as the result of French conquest, the treaties with Sardinia and the two Sicilies abrogated upon their becoming part of the Kingdom of Italy; and, to quote counsel's precise language:

> "All treaties concluded with the former Kingdom of Hannover and Nassau terminated in consequence of their incorporation of the Kingdom of Prussia in 1846 and 1856." Counsel then claim that Prussia was 'absorbed' by the German Empire in 1871 precisely as Hannover and Nassau were absorbed by Prussia, and that this alleged absorption of Prussia disposed of its international treaties as effectually as it did in the other instances. In concluding the discussion of this element of their case counsel ask, however: 'Can a treaty exist between an independent sovereignty and another state forming only a component part of another independent sovereignty (the German Empire), the latter not having even adopted such treaty, but by clear implication, at least, having annulled all such treaties by its original laws.'"

This "clear implication" they derive alone from the above section of the German constitution relating to existing treaties between the different states of the German Empire upon subjects wholly foreign to this controversy.

The questions raised in the above argument render it expedient to cast a brief retrospect into the political history of the German states and their relations to one another during the period within which the government of the United States has maintained treaty relations with them.

Aside from the intimate intercourse established between the government of the United States and the Kingdom of Prussia by the important treaty of amity and commerce concluded in 1785 and renewed with certain modifications in 1799, and again in 1828, diplomatic negotiations subsequently also became quite extensive between the government at Washington and the smaller German states. These states were at that time, including Prussia, all members of the so-called Germanic confederation created by the Congress of Vienna on the 8th of June, 1815. Art. II of the fundamental law of that confederation reads as follows:

> "The object of the confederation is the preservation of the external and internal security of Germany and of the independence and inviolability of the confederated German states."

There were imposed upon the states numerous restraints regarding the exercise of internal sovereignty, but in their peaceful diplomatic intercourse with foreign powers they remained fairly independent, although:

> "The Diet had power to establish fundamental laws for the confederation and organic regulations as to its foreign, military and internal relations."

See Lawrence's Wheaton, Elements of International Law, p. 80.

No American minister had been accredited at any of the courts of the German states since John Quincy Adams

had represented our government at Berlin from 1797 until 1801. But owing to the rapid political and industrial growth of Prussia, our government, in 1835, reestablished the post of minister at said court, and in order that no opportunity should be lost to cultivate with that country relations of mutual interest, sent our great American jurist, Henry Wheaton, as its representative. During his residence at Berlin, extending over a period of eleven years, Mr. Wheaton, under instructions from the state department, concluded with a number of the German states, Bavaria, Wurtemberg, Saxony, Hannover, Hesse-Cassel and Nassau, a series of treaties which had for their object chiefly the surrender of the *droit de detraction* and the *droit d' aubaine,* so extensively practiced at that time by most all the states on the continent of Europe. Concerning those treaties Mr. Wheaton wrote to the Secretary of State May 14, 1845, as follows:

> "The tax imposed on the funds removed by emigrants, who leave this country (Germany) amounts in Saxony and most of the German states to ten per centum on the capital thus transferred. This amount is so much clear gain to us in the capital thus brought into the country by the rich peasants and others, who sell their real property here and emigrate in great numbers to the United States. The *droit d'aubaine* is equally oppressive, subjecting to a like duty all property, which emigrants to the United States might derive on the death of relatives in the country of their origin; and the duty imposed in such cases is also, in general, ten per cent. on the capital."

It is evident that these treaties, which to this very hour are held by both sides, the German governments and the government of the United States, to be in full force, have

been of incalculable benefit to our country. When they were negotiated the very framer, our most celebrated American teacher of international law, notwithstanding the contention of counsel that a state, in order to be able not only to make, but also to maintain, a treaty, must at all times be in the full possession of all the attributes of sovereignty, was evidently wholly unconcerned as to which of these attributes had been taken from the German states and transferred to the Germanic Confederation, so long as he was satisfied that these states were not deprived of the prerogative to regulate the subject of taxation for their citizens and to waive the same by solemn international compact in favor of emigrants. And yet the great German jurist, Professor Mittermaier, of Goettingen, was wont to say to his class of students concerning the author of these treaties:

> "And first of all, young gentlemen, I give you the name of the great American writer, Mr. Wheaton, the best authority in any language on the subject of International Law."

How unmindful, in the eyes of counsel, must these two learned teachers have been of the cardinal principles regulating the making and maintaining of treaties.

If counsel's argument to the effect that the extradition treaty with Prussia concluded in 1852, when that state was a member of the Germanic Confederation, has become invalid on account of the formation of the German empire, is worth anything at all, then it necessarily follows that Mr. Wheaton's beneficent treaties with the other German states, likewise formerly belonging to that confederation and now members of the same empire, also fall to the ground.

The war between Austria and Prussia in 1866 resulted in the total extinction of the Germanic Confederation. Prussia conquered the kingdom of Hannover, the electorate of Hesse-Cassel, the grandduchy of Nassau and the free imperial city of Frankfort, completely effaced their independent governments, and reduced them to provinces of her own kingdom. Having thus become absolutely extinct and being wholly deprived of any and all organs through which international treaty obligations could be carried out, and diplomatic intercourse maintained, it naturally followed that their compacts with foreign nations were ended.

Upon the ruins of the Germanic Confederation, Prussia, in the same year, erected the North German Union, of which twenty-one independent German states became members. As regards this creation, Mr. Seward, as secretary of state, wrote under date of December 9, 1867, to George Bancroft, our minister at Berlin, among other things, as follows:

> "It shows that upon due consideration you have decided to recognize officially, not only the Prussian parliament, but also the parliament of the North German United States, and the collective German Customs and Commerce Union, upon the ground that by the paramount constitution of the North German United States, the King of Prussia, to whom you were accredited, is at the head of those several organizations or institutions. This decision is entirely approved."

See Message and Documents, Dept. of State, Part 2, p. 40.

It has never been claimed by any sane person that on account of the formation of the North German Union and the adoption of a constitution for that body, Prussia

was absorbed and became extinct, and yet her relations to that Union were very much the same as those subsequently established and now maintained between her and the German Empire.

Shortly after his appointment as minister Mr. Bancroft resumed with the government of the *North German Union* the negotiations which his predecessor, Mr. Joseph A. Wright, had opened with the *Kingdom of Prussia* for the perfection of a naturalization treaty between our government and said Union, in order to remove from the diplomatic intercourse between the two powers the frequent controversies relating to compulsory enlistments of naturalized American citizens of German birth upon returning for a brief visit to their native homes, and it is due to the great diplomatic skill of the American minister that the treaty was finally, to wit: on February 22, 1868, concluded between his government and *the North German Union*. Article III of that treaty, which provides that the convention for the mutual delivery of criminals of the 16th of June, 1852, shall be "extended to all the states of the North German Confederation," proves not, as counsel claim, that the parties to the treaty regarded it as abrogated by the formation of that Union, but the very opposite, for else the high contracting parties would not have said that it shall be *extended*, but that it shall be *revived* or *renewed*. The fact is that all the members of the North German Union were parties to the extradition treaty with Prussia, except the two Hanseatic republics of Hamburg and Lubeck, and the intention of the two contracting governments therefore clearly was to have these countries also embraced within that compact.

The North German Union was incorporated into the German Empire by the adoption of the German constitution in April, 1871. When this happened, then, according to counsel's logic, not only Mr. Wheaton's treaties, but also this naturalization treaty, must have been wiped out, although the statesmen charged with its strict observance and at the head of affairs in Washington and in Berlin have at all times studiously preserved its integrity. The reason why this treaty is still in existence is obvious. It is plainly pointed out in the passage above quoted from Secretary Seward's letter to our minister. The King of Prussia, who was declared to be the chief executive of the North German Union and in the possession of the necessary powers of government to carry into effect all its international obligations, as well as his Kingdom, are still in existence. We shall presently see that the language of Mr. Seward, "that by the paramount constitution of the North German Union the King of Prussia is at the head of the several German organizations or institutions," applies with equal force to the political conditions established by the states in erecting the German Empire.

After the Franco-German war in 1871 all the different states which had theretofore constituted the Germanic Confederation, with the exception of Austria, entered into a voluntary alliance under the leadership of Prussia and gave it the name of the German empire. We shall presently quote from the constitution of that empire, found on pp. 383 *et seq.*, in the Volume of Foreign Relations of the United States for the Year 1871, those passages which relate to the subject-matter under discussion.

In the official promulgation of that constitution by the "German Emperor, King of Prussia," as he styles himself, it is especially recited:

> "Instead of the constitution of the Germanic Confederation adopted by the North German Union, etc., etc., the following constitution for the German Empire is adopted."

The preamble of the German constitution reads as follows:

> "His Majesty the King of Prussia, in the name of the North German Union, His Majesty the King of Bavaria, etc., etc., conclude an eternal alliance for the protection of the territory of the Confederation, and of the laws of the same, as well as for the promotion of the welfare of the German people."

Articles 2 and 5 (Div. II.) relate to the legislation of the Empire and after reciting (Art. 2), that

> "within this territory the Empire shall have the right of legislation according to the provisions of this constitution, and the laws of the Empire shall take precedence of those of each individual state, etc.,"

it is, among other things (Subdivision 13 of Art. 4), provided that the federal legislation shall extend to

> "the law of obligations, *criminal law*, commercial law, and the law of exchange, likewise to judicial procedure."

Article 6 provides:

> "The federal council (the upper chamber of the German parliament) shall consist of the representatives of the states of the Confederation, among whom the votes shall be divided in such a manner that Prussia (including Holstein, Hannover and the other territory acquired by conquest in 1864 and 1866) shall have 17 votes; Bavaria, 6 votes, etc., etc. Each member of the Confederation shall appoint as

many delegates to the federal council as it has votes; the total of the votes of each state shall, however, be cast by one delegate."

It appears, therefore, that the upper house, appointed as it is by the executive authority of each one of the several German states and its votes being cast not by individuals as such, but by states, bears a striking resemblance to the constitution of the American Congress under the Articles of Confederation.

Article 7 provides in what cases the federal council shall take action, in substance, concerning:

"1. The measures proposed to the diet (the lower house of parliament) and the resolutions passed by the same.

2. The general provisions and regulations necessary for the execution of the laws, etc.

3. The defects which may be discovered in the execution of the laws, etc."

Under Art. 8 the federal council shall divide itself into eight committees, each to have under its special care a certain subject of federal legislation, and in each committee at least four states of the Confederation shall be represented.

Art. 9 confers upon each member of the federal council the right to appear in the diet at any time and be heard there, in order to represent the views of his state.

Under Art. 10 "the Emperor shall afford the customary diplomatic protection to the members of the federal council," who, it appears from other provisions, are regarded as the plenipotentiaries of their respective states.

Art. 11 (Div. IV.):

"The King of Prussia shall be the President of the Confederation and shall have the title of German Emperor. The Emperor shall represent the

Empire among nations, declare war, and conclude peace in the name of the same, enter into alliances and other conventions with foreign countries, accredit embassadors, and receive them. For a declaration of war in the name of the Empire the consent of the federal council shall be required, except in case of an attack upon the territory of the Confederation or its coast."

"So far as treaties with foreign countries refer to matters which, according to Article 4, are to be regulated by the legislature of the Empire the consent of the federal council shall be required for their ratification, and the approval of the diet shall be necessary to render them valid."

The other powers delegated by the constitution to the King of Prussia as German Emperor bear no relation whatever to the matters in issue.

Articles 20-32 (Div. V) determine the composition of the diet, the election of its members by universal suffrage, its sessions, mode of dissolution and the rights of members.

Art. 56 (Div. X):

"The Emperor shall have the supervision of all consular affairs of the German Empire, and he shall appoint consuls, after hearing the committee of the federal council on commerce and traffic."

"No new state consulates are to be established within the jurisdiction of the German consuls. *German consuls shall perform the functions of state consuls for the states of the Confederation not represented in their district, etc.*"

We quote these last two provisions to show that by the very terms of the German constitution the consuls appointed by the Empire are distinctly recognized as the consuls of the different states of the Confederation.

The remaining paragraphs, relating as they do to customs and commerce, the railways, mails and telegraph,

marine and navigation, the army, the finances, punishment of offenses committed against the integrity of the Empire, etc., and the mode of amending the constitution, are wholly foreign to the matters in issue, and the above quotations are all the provisions which concern the same in the remotest degree. Nowhere in the entire constitution can any provision be discovered which, either in express language or by implication, contains the remotest reference to the former diplomatic relations of any one of the different states of the Confederation, or to their international treaty obligations; nor can in any one of the enumerated powers delegated to the federal government by the states composing the Confederation a single passage be found from which it could be inferred that they intended to part or did part with any one of those attributes of internal sovereignty which comprise the organs of government necessary to render to the United States of America or to any other government, to whom they bear similar relations, the personal service required of them under the conventions concluded by them for the mutual surrender of criminal fugitives. Neither the written constitution of the Kingdom of Prussia nor the internal integrity of said Kingdom has been in the least affected by its entering into the voluntary compact for the formation of the German Empire. It still maintains its independent judiciary and its police, as well as its ministers who carry out the decrees of the King relating, among other things, to the faithful observance of international obligations.

But counsel contend that the provision of Art. 3 by which those treaties concluded before the adoption of the constitution between the various states of the federation "in relation to the custody of persons who are to be ban-

ished, the care of sick, and the burial of deceased citizens," are to remain in force,

> "makes it clear that the German constitution abrogated all existing treaties between the several states and other nations. * * * The empire did not intend to endorse such treaties and consequently abrogated them."

This argument is striking. Counsel invoke the maxim, that international treaties are to be treated like contracts between individuals, subject to the same rules of construction. The passage quoted is silent as to any and all treaties concluded between the separate German states and foreign governments. This silence alone, in the eyes of counsel, suffices to condemn all such treaties. Let us illustrate counsel's logic by an example from the ordinary affairs of life: A and B enter into a contract with each other to carry on a joint venture. Each of them, independent of the other, is long since bound to perform certain service under stated conditions, the one to C the other to D. In their present agreement A and B say nothing about these obligations to third parties, and the third parties are not taken into their counsels with reference to the same. This, according to counsel's remarkable discovery, is sufficient to absolve them of all obligations under their separate contracts with C and D. Such logic, coming from members of the legal profession, is simply astounding.

The separate German states are doubtless under old treaty obligations with other governments besides our own. It is not known that any of these obligations have ever been disregarded and in the case of the United States it is conceded by the political department of its government that they have at all times been faithfully fulfilled.

It never occurred to any one of the German statesmen and jurists, not even to those who were instrumental in framing the German constitution, that in discharging those obligations, their state governments performed wholly idle acts of supererogation, because, after a lapse of thirty years, it has at last been discovered by counsel for a criminal fugitive from the justice of one of their states, that their federal constitution wiped out those treaties, that they were wholly ignorant of its true spirit and that, when they framed that instrument, they really did not know what they were doing. And our American statesmen in charge of the State Department at Washington will be no less surprised at the wonderful discovery that the extradition treaty with Prussia is abrogated, not because it expired by its terms, not because the honor or interest of any one of the parties thereto has prompted its annulment, not because Prussia has at all violated it or has shown the slightest unwillingness to carry it out, but simply because the government of that country has agreed with several outsiders (the other parties forming with it the German Empire) that certain relations pending between them and wholly foreign to the subject-matter of the treaty in question shall in the future be maintained between them as they were in the past. It must be admitted that a proposition to throw up a solemn agreement between two respectable governments with such *abandon* as this has never been submitted to a court of justice before.

Every government has the power, so long as the same has not been voluntarily relinquished, or forcibly taken away by others, to contract treaties concerning all those subjects which are within the scope of its internal sovereignty, however limited this may be,

and in this sense the American government has never, within these limits, hesitated to treat with the Indian tribes within its boundaries, although they never had the sovereign right "to declare war, coin money, regulate foreign commerce, etc., etc.," all of which counsel insist are prerequisites to the power of making any kind of treaties, but have always been regarded solely as subjects and the wards of the nation. Nor are treaties abrogated, as is claimed, simply because a state voluntarily transfers one or more attributes of its sovereignty to an ally. Were this the case it might as well be claimed that a business man is exonerated from his contractual obligations simply because he has placed a certain branch of his business in charge of an overseer or a copartner.

In international law neither an alliance nor a change of government has ever been treated as sufficient to abrogate international treaties.

We believe we have hereinabove sufficiently shown that the alliance which Prussia has formed with the other German states in establishing the German Empire has not had the slightest effect upon her international treaty obligations. We will, therefore, now consider the next error assigned.

Did the District Court err in holding that the question of the existence of a treaty is not within the province of the courts to decide, but should be determined by the political department of the government?

In regard to this point we first beg to refer to the notes of Mr. J. C. Bancroft Davis accompanying the State Department's compilation of Treaties and Conventions between the United States of America and other powers

since July 4, 1776, published in 1889. Mr. Davis (p. 1234) has this to say concerning

"Treaties with Powers that have been absorbed into other nationalities: Algiers: Treaties of 1795, 1815 and 1816, French jurisdiction extended by conquest in 1830 over Algiers, and consuls are acting there under French exequaturs; *Hanover: Treaties of 1840, 1846, 1855 and 1861.* All the treaties with Hanover are regarded as having terminated in consequence of its conquest and incorporation into the Kingdom of Prussia in 1866; Nassau (treaty of), 1846. Prussian jurisdiction was extended over Nassau by conquest in 1866.

The establishment of the German Empire in 1871, and the complex relations of its component parts to each other and to the Empire, necessarily give rise to questions as to the treaties entered into with the North German Confederation and with many of the states composing the Empire. It cannot be said that any fixed rules have been established.

Where a state has lost its separate existence, as in the case of Hanover and Nassau, no questions can arise.

Where no new treaty has been negotiated with the Empire, the treaties with the various states which have preserved a separate existence have been resorted to.

The question of the existence of the extradition treaty with Bavaria was presented to the United States District Court, on the application of a person accused of forgery committed in Bavaria, to be discharged on *habeas corpus*, who was in custody after the issue of a mandate, at the request of the minister of Germany. The court held that the treaty was admitted by both governments to be in existence.

Such a question is, after all, purely a political one."

By way of parenthesis we wish to remark that, if there is a faint touch of uncertainty contained in the foregoing statements as to whether the extradition

treaties with the German states should not have been replaced by a treaty with the Empire, their continuous validity has assuredly long since been placed beyond all doubt by the political departments of all the governments concerned in them and mutual extradition has been effected under them without interruption. So far as the Kingdom of Prussia is concerned it ha. permitted no question to arise as to its treaty with the United States being binding on it. In June, 1889, the Foreign Office of the German Empire promulgated its "Memorandum relating to the procedure on International Extradition employed by the German Empire and the Kingdom of Prussia," which stands in place and has the force of statutory enactments. We quote from the same the following passages contained on p. 726 (under Par. 469) of Vol. 1, Moore on Extradition:

> "In so far as by laws and treaties of the empire relating to the extradition of criminals, provisions which bind all the states of the union have not been made, those states are not hindered from independently regulating extradition by agreements with foreign states or by laws enacted for their own territory.
>
> "Of conventions, some of an earlier, some of a later period, for the extradition of criminals, entered into by individual states of the union with various foreign states, there exist a number, and in particular such with France, the Netherlands, Austria-Hungary and Russia. With the United States of America, also, extradition is regulated by various treaties, as, besides the treaty of June 16, 1852, which applies to all of the states of the former North German Union, and also to Hesse, south of the Main, and to Wurttemberg, there exist separate treaties with Bavaria and Baden, of September 12, 1853, and January 30, 1857, respectively."

This shows conclusively not only that Prussia has at all times been ready and willing to carry out the obligations devolving upon it under its extradition treaties with foreign powers, but that the German Empire itself recognizes that the obligations arising under the former treaties of the several states are still binding upon them.

This should set the matter at rest once for all.

But let us see whether Mr. Davis is not perfectly right in declaring that the question whether a treaty is still in existence or not "is purely a political one." If he is, then his declaration carries with it the plain inference that the willingness or ability of the parties to a treaty to carry it out can alone be determined by the political department of the government. By the constitution of the United States the President has the power, by and with the advice and consent of the Senate, to make treaties. He is authorized to appoint ambassadors, other public ministers and consuls, and to receive them from foreign nations. Thus he is enabled to obtain accurate information of the political condition of the nations with which he treats, what powers of sovereignty they exercise and whether any limitations are placed upon that sovereignty which may affect the faithful fulfillment of international treaty obligations. The President, therefore, and the Department of State are the only proper organs of the government of the United States to ascertain and determine whether any state with whom treaty relations have been once established has either violated them or has lost its individual existence so as to be unable to observe them.

In *Doe* v. *Braden*, 16th Howard, 635, it was urged, among other things, before this court, that the King of Spain had not the power to annul a certain land grant

to the duke of Alagon, as he did by the treaty of February 22, 1819, by which Florida was ceded to the United States, but that this power existed alone in the Spanish Cortes, and that hence at least that part of the treaty by which the grant was annulled was void. The court disposes of this point in the following words:

> "The constitution declares that all treaties made under the authority of the United States should be the supreme law of the land."
>
> "The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms. And it would be impossible for the Executive Department of the government to conduct our foreign relations with any advantage to the country, and fulfill the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered."
>
> "Nor can the plaintiff's claim be supported unless he can maintain that a court of justice may inquire whether the President and Senate were not mistaken as to the authority of the Spanish monarch in this respect; or knowingly sanctioned an act of injustice committed by him upon an individual in violation of the laws of Spain. But it is evident that such a proposition can find no support in the Constitution of the United States, nor in the jurisprudence of any country where the judicial and political powers are separated and placed in different hands. Certainly no judicial tribunal in the United States ever claimed it or supposed it possessed it."

If, therefore, it is not proper, as the court here holds, for the courts of the country to inquire and decide whether the person who ratified the treaty on behalf of a

foreign nation had the power to make the engagements into which he entered, it follows as a necessary corollary that not the courts, but the political and legislative departments of the federal government, having once entered into treaty stipulations with a foreign state, are alone competent to determine whether the power remains in that state to carry out the obligations prescribed by the treaty or not. And if, as this court also rules, the courts of justice have no right to inquire whether the President and Senate were not mistaken as to the authority of the organs of a foreign government with whom a treaty is concluded, it would likewise appear to be plain that the question whether the President and the Department of State may not be mistaken in assuming that a treaty, once concluded with a foreign power, remains still in full force and effect, is as effectually withdrawn from the jurisdiction of our courts as the first.

In *Foster* v. *Neilson*, 2 Pet., 314, the question arose whether the clause in the same treaty between the United States and Spain in which it was stipulated by the former "that all grants of land made, etc., by his Catholic Majesty, etc., shall be ratified and confirmed to the persons in possession of the lands, etc.," operated on the titles of the lands or not. Mr. Chief Justice MARSHALL decided as follows:

> "Our constitution declares a treaty to be a law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not to the judicial department."
>
> "The judiciary is not that department of the gov-

ernment to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established."

In *Taylor* v. *Morton*, 2 Curtis, 455, it is held that:

"A promise in a treaty, that the products of one country shall not be subjected to a higher rate of duty than like products imported into the United States from other countries, addresses itself to the political and not to the judicial department of the government, and the courts cannot try the question whether it has been observed or not."

The court says further:

"Is it a judicial question, whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty has been voluntarily withdrawn by one party so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative have given just occasion to the political departments of our government to withhold the execution of a promise contained in a treaty, or to the act in direct contravention of such promise? I apprehend not. These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them, but to the executive and the legislative departments of our government. They belong to diplomacy and legislation, and not to the administration of existing laws. And it necessarily follows that if they are denied to Congress and the Executive, in the exercise of their legislative power, they can be found nowhere in our system of government."

The doctrines here enunciated have been uniformly followed by the ablest appellate tribunals of the different states of the Union. Thus in *Maiden* v. *Ingersoll*, 6 Mich., 376, in which it was claimed that the power of the

Pottawatomie Indians to cede certain lands in the State of Michigan by treaty, as had been done by them, could be questioned by the courts, the Supreme Court of that state holds as follows:

> "When a treaty has been made by the proper federal authority and ratified, it becomes the law of the land, and the courts have no power to question, or in any manner look into, the powers or rights of the nation or tribe with whom it is made. The action of the treaty making power is conclusive upon such inquiry."

We do not wish to encumber this brief with any further quotations in relation to such self-evident propositions. Indeed, no court in the land has ever, in opposition to the executive and legislative branches of the government, declared a treaty to be inoperative or void on account of any act or default of the other party to it. To do so would be a wholly unwarranted interference with those branches of the government to whom the power of making treaties is specially intrusted by the Constitution. Hence in all cases which have ever arisen in this, or other courts in the land, and in which international relations have been at stake, it has been invariably held that they must be determined in the first place by the legislative and executive departments of the government, and as these departments view them, so must the courts view them.

In the above quotation from Mr. Davis' notes, reference is made to the case decided in 1874 in the Southern District of New York, and in which the validity of the extradition treaty with Bavaria was called in question for the same reason that that kingdom had become part of the German Empire. This was the case of Thomas, a fugitive from the justice of said kingdom, charged with

forgery. The court disposed of the objections raised against the treaty as follows:

> "It is further contended, on the part of Thomas, that the convention with Bavaria was abrogated by the absorption of Bavaria into the German Empire. An examination of the provisions of the Constitution of the German Empire does not disclose anything which indicates that then existing treaties between the several states composing the confederation called the German Empire, and foreign countries, were annulled or to be considered as abrogated."
>
> "Indeed, it is difficult to see how such a treaty as that between Bavaria and the United States can be abrogated by the action of Bavaria alone, without the consent of the United States. Where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being in such case not absolutely void, but voidable at the election of the injured party, who may waive or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to a rupture. (1 Kent's Com., 174.) In the present case the mandate issued by the government of the United States shows that the convention in question is regarded as in force, both by the United States and by the German Empire, represented by its envoys, and by Bavaria, represented by the same envoy. The application of the foreign government was made through the proper diplomatic representative of the German Empire and of Bavaria, and the complaint before the commissioner was made by the proper consular authority, representing the German Empire and also representing Bavaria."
>
> *In re* Thomas, 12 Blatchford, pp. 379 and 380.

Counsel, referring to this case, speak about it in their printed briefs filed in the court below as follows, to wit:

> "It seems to us that the court missed the point under discussion entirely. There is here no ques-

> tion of abrogation or violation of treaties. The question here is, does the *disappearance* of a treaty-making, independent sovereignty carry with it the treaties theretofore made? Can a treaty exist between an independent sovereignty and another state, forming only a component part of another independent sovereignty, the latter not having even adopted such treaty, but by clear implication at least, have annulled all such treaties by its organic law?"

We believe we have already clearly shown the absurdity of these assertions. The question so wantonly raised in the case at bar is a serious one. As we have already pointed out, it does not only involve the validity of the extradition treaty with Prussia and a number of other German states, but it applies alike to the treaty of friendship concluded with that country in 1828; to a similar treaty with the Hanseatic republics of 1827; to all the Wheaton treaties; to the extradition treaty with Bavaria of 1853 and to that with Baden of 1857; to the several naturalization treaties with Bavaria, Wurttemberg, Baden, Hesse-Darmstadt and the North German Union concluded in 1868; as also to the conventions patterned after the Wheaton treaties with Mecklenburg-Schwerin and Oldenburg in 1847 and with Brunswick-Luneburg in 1854. In short, if counsel are correct, then all the treaties which for a period ranging from more than thirty to nearly a hundred years have so happily aided in cementing the peaceful and intimate intercourse between two great nations and which the statesmen on both sides of the Atlantic, who have been concerned in them, have in all seriousness treated at all times, to this very day, as valid and of binding force, are rooted out with one fell stroke.

But in this very case we should not omit to mention the undeniable fact that counsel for the fugitive, not satisfied with bringing the question into the courts, have also submitted to the Department of State all they are able to say on the subject of this treaty. They have there likewise been given a very patient hearing, both upon the facts and the law of the case, and, as a matter of courtesy, were granted quite an extension before final action was taken upon the record of their client's guilt returned by Commissioner Foote. And the State Department, taking upon full consideration the same view of the matter as did the court below, has rejected counsel's arguments against the treaty as worthless and has issued the warrant for the extradition of counsel's client, deliberately certifying therein that the requisition for the delivery of Gerhard Terlinden to the Prussian authorities has been made and granted upon proof

> "in conformity with the provisions of existing treaty stipulations between the United States of America and Prussia and other states of the Germanic Confederation for the mutual delivery of criminals, fugitives from justice in certain cases, etc."

Extradition treaties have become universal among the civilized nations of the world. Designed as they are to prevent in this age of rapid transit the easy escape of criminals from one country to the other, their integrity and faithful observance are demanded by sound policy and good morals. International obligations based upon mutual compacts of every character are held to be sacred by every self-respecting nation so long as its interest and its honor do not demand their abrogation, and this applies with particular force to treaties under which fugitive criminals are to be delivered up to the justice

of the country from which they have fled. Counsel say they "do not claim that either party has violated the provisions of the treaty with Prussia," but they contend that

> "the treaty has been dissolved, terminated by operation of the law, in this case by operation of International Law."

This is, to say the least, a very strange view of International Law. Counsel evidently look upon it in the light of a positive rule of action prescribed by a superior power and to which everybody concerned owes strict obedience. This is a fatal error. Wheaton says:

> "International Law, as understood among civilized nations, consists of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent."

If, therefore, International Law ever was what counsel claim it to be, which, however, must be denied, then it is highly creditable to the two nations concerned in the extradition treaty under discussion, that their enlightened governments have modified that law so as to make it consonant to reason and justice.

HAS THE CRIMINAL LAW OF PRUSSIA BEEN VIOLATED?

In connection with the discussion relating to the existence of the treaty, counsel also assert that the commissioner lacked jurisdiction, because the fugitive is sought to be extradited to Prussia, whereas, as they say, the criminal laws of Germany and not those of Prussia were violated, since (according to their contention) Prussia has no criminal laws. This position is, to say the least, unique. By the constitution of the German

Empire (Art. 4, Subd. 13) the power to pass uniform criminal laws for the entire territory of the federation was delegated to the central government, and accordingly a uniform criminal code was enacted in 1872, but these laws are administered on Prussian soil by Prussian courts, who pronounce sentence in the name of the King of Prussia, and such laws are none the less the laws of Prussia and of each individual state, because they emanate from a central body. The law of the whole land is the law of every part. *Omne majus continet in se minus.*

But this question is not even material. Neither the treaty in question nor the Acts of Congress in relation thereto make any requisition upon the foreign government concerning the mode in which it shall enact its criminal statutes or the source from which it shall derive the same. The treaty provides in substance:

> "It is agreed that the United States and Prussia shall upon mutual requisitions, etc., etc., deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, etc., or forgery, or the utterance of forged papers, etc., committed within the jurisdiction of either party, shall seek an asylum or shall be found within the territories of the other, etc."

Sec. 5270 (Title LXVI) of the Revised Statutes of the United States reads as follows:

> "Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner authorized so to do by any of the courts of the United States, etc., may upon complaint under oath, charging any person found within the limits of any state, district or territory with having committed within the jurisdiction of any such

> foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of any person so charged, etc."

If then it is properly set forth in the complaint, as is the case, that the crimes were committed "within the territory," or "within the jurisdiction" of the Kingdom of Prussia, then the complaint is sufficient under the treaty and the law to form the basis of extradition proceedings and upon proper showing before the commissioner, to warrant a fugitive's extradition, no matter whence the demanding government derived its laws.

DID THE COURT ERR IN DENYING THE RIGHT TO INTRODUCE EVIDENCE FOR THE PURPOSE OF SHOWING THAT NO EXTRADITABLE OFFENSE HAS BEEN COMMITTED?

The petition for the writ of *habeas corpus* was filed before any evidence was taken before the commissioner.

It has been universally held that the question of a prisoner's guilt or innocence must, after indictment, be submitted to a jury. It cannot be tried on *habeas corpus*.

See:

People v. *McLeod*, 1 Hill, 377.
Carcemi v. *People*, 18 N. Y., 129.
People v. *Ruloff*, 5 Park C. Rep., 77.
People v. *Richardson*, 18 How. Pr., 93.

In the case of *ex parte Crouch*, 112 U. S., 178, the court holds:

> "The office of a writ of *habeas corpus* is neither to correct errors of the court below, nor to take the prisoner away from the court which holds him for trial, for fear, if he remains, they may be committed."

"The question of the guilt or innocence of the prisoner is not to be considered on an inquiry of this character."

In re Reynolds, 20 Fed. Cas., 609.

"The court on *habeas corpus* will inquire only into the jurisdiction of the inferior court, either in regard to the subject-matter or the person.

In re Mayfield case, 141 U. S., 107."

"The writ brings up the body of the prisoner and the cause of commitment; the court can inquire into the sufficiency of that cause, but if it is the judgment of a court of competent jurisdiction, that judgment is of itself sufficient cause."

In re Watkins, 3 Pet., 193.

Counsel rely on Sec. 761 of the Revised Statutes, which provides that the court issuing the write of *habeas corpus* shall determine the facts in the case, by hearing the testimony and arguments, asserting that this section makes it the duty of the judge to hear evidence relating to the prisoner's guilt or innocence and virtually to take the case out of the hands of the commissioner. That this is not the meaning of the section is evident from numerous cases decided by this court subsequent to its enactment, and in which the right of the court issuing the writ of *habeas corpus* to look into the evidence of the prisoner's guilt or innocence is expressly denied.

Horner v. *United States*, 143 U. S., 207.
Oteiza v. *Jacobus*, 136 U. S., 330.
Stevens v. *Fuller*, 136 U. S., 468.
Ornelas v. *Ruiz*, 161 U. S., 502.
Ex parte Bryant, 167 U. S., 104.

In *Ornelas* v. *Ruiz*, 161 U. S., 502, 508, Mr. Chief Justice FULLER, in delivering the opinion of the court, says:

> "By repeated decisions of this court it is settled that a writ of *habeas corpus* cannot perform the office of a writ of error, and that in extradition proceedings, if the committing magistrate has jurisdiction of the subject-matter and of the accused, and the offense charged is within the terms of the treaty of extradition, and the magistrate, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision cannot be reviewed on *habeas corpus*."

If, then, it is good law that the court will not review the evidence before a commissioner in a case of this kind, it can certainly not be good law for the court to take the evidence out of the hands of the commissioner, hear the case itself and determine the issues after the commissioner has acquired jurisdiction.

In the case of *Benson* v. *McMahon*, 127 U. S., 457-463, this court says:

> "We are not sitting in this court on the trial of the 'prisoner with power to pronounce him guilty and punish him, or declare him innocent and acquit him.'"

Petitioner's motion to have the District Court hear the testimony was therefore properly denied.

3. DID THE DISTRICT COURT ERR IN DENYING APPELLANT'S PRAYER FOR A CERTIORARI IN AID OF THE WRIT OF HABEAS CORPUS?

The record in this case shows that the prisoner in his petition for the writ, in addition to the objection he raised against the treaty, relied alone upon the complaint filed

with the commissioner and the warrant issued thereon. He prosecuted his writ pending the proceedings before the commissioner and before any testimony was introduced. Copies of the complaint and warrant were attached to the petition and admitted by the respondent to be correct. Hence there was no need for the writ of *certiorari*.

But we also wish to urge that this writ is never granted before the final determination of the case pending in the lower court, whose record is called for.

> "The writ is necessarily founded on a final determination. Were the rule otherwise, a writ might issue at any step in the proceedings of the interior tribunal, although such tribunal might, were the points presented to it, decide it had no jurisdiction in the matter submitted to it. This would be the exercise of original jurisdiction by the court issuing the writ, and not a review of the determination of the inferior tribunal. The matter complained of would be, not that the tribunal had exceeded, but that it was about to exceed its jurisdiction."
>
> "The writ of *certiorari* is a writ of review."
>
> *People* v. *County Judge*, 40 Cal., 479.
> *People* v. *Lindsay*, 1 Idaho, 374.
> *Stokes* v. *Early*, 45 N. J. L., 478.
> *Ex parte* Hamilton, 58 How. Pr., 290.
> *Noble* v. *Board of Pilots*, 37 Barb., 120.
> In the case of the Road, 2 S. & R., 419.

But in their printed briefs filed in the United States Circuit Court of Appeals for the Seventh Circuit, counsel say as follows:

> "The *petition of appellant* for the writ of *certiorari* shows that the purpose of the application was to bring to the notice of the court copies of the *original warrant of arrest filed in the courts of Ger-*

> *many.* The importance of these records is readily apparent when it is remembered that it was the contention of appellant that said original warrants so filed in the German courts, *did not show the commission of an extraditable offense by him,* even if an extradition treaty was in force. Therefore, we submit that the court erred in denying the petition for the writ of *certiorari* to the commissioner for the purpose of sending up the record to said District Court."

It is evident from appellant's own sworn statement contained in his "traverse," as we have already pointed out, that he had it as much in his power to bring before the district judge "copies of the original warrant of arrest filed in the courts of Germany," as to produce what he claims to be a copy of the depositions filed with the complaint. The one was part of the other, as is shown by the German Consul's complaint from which he quotes, and why appellant should produce only copies of these depositions, which he also well knew formed but a small part of the testimony against him, but not the copy of the warrant, he and his counsel can best explain themselves.

The motion to "stay all further proceedings before the United States commissioner," which the court very properly denied (Rec. p 56), was likewise wholly out of place. All the proceedings before the commissioner, pending the inquiry upon the writ of *habeas corpus,* were conducted with the express consent and approval of the district judge.

The court did not err in denying the writ of *certiorari.*

DID THE COURT ERR IN HOLDING THAT THE RECORD SHOWS THE COMMISSION OF AN EXTRADITABLE OFFENSE?

As we have heretofore submitted, the question as to what the "record" showed in regard to the commission of the offense by the prisoner was not a proper subject for the decision of the District Court. It was its duty, however, to determine whether the complaint on which the warrant issued properly charged an extraditable crime, *i. e.*, the crimes of forgery and uttering forged papers.

The complaint in this case charges with great minuteness a large number of extraditable crimes, each of them distinct enough to be fully recognized as such, and constituting forgery at common law as well as under the statutes of the different states of the Union. The crimes complained of are:

1. The forging and uttering of a large block of stock certificates of the Gerhard Terlinden Stock Company.

2. The forging of the revenue stamp of the German government employed by the Royal Prussian Revenue Office.

3. The forging and uttering of a number of draft acceptances.

In the case of *Benson* v. *McMahon*, 127 U. S., 457, this court has said:

> "We do not see that in this application to set the prisoner at large, after he has been once committed by an examining court having competent authority, and after having been held in Mexico for the offense charged, this court is bound to examine with very critical accuracy into the question as to whether

> or not the act committed by the prisoner is technically a forgery under the common law. Especially is this so when the wickedness of the act, the fraudulent intent with which it was committed and the final success by which the fraud was perpetrated, are undoubted."

This language is cited with approval by this court in the case of *Oteiza* v. *Jacobus*, 136 U. S., 330.

In this view of the matter we submit to this court the provisions from the German Criminal Code, which the prisoner is charged by the Prussian Court at Duisburg, before whom this case is pending, with having violated, and which are contained in the warrant of arrest issued by the court. This warrant, duly authenticated by the United States embassy in Berlin, was attached to those depositions which we filed with the commissioner, before the writ of *habeas corpus* was issued, and as we have above pointed out, appellant's counsel did not see fit to submit to the court below with their so-called "traverse" a copy of said warrant and of said penal provisions. These provisions are as follows:

> "Par. 267. Whoever with unlawful intent forges or counterfeits a domestic or foreign public instrument or such a private instrument as may be of importance for the purpose of proving rights or legal relations, and makes use of the false for the purpose of deception, is punishable with imprisonment for forgery of instruments.
>
> "Par. 268. Forgery of an instrument made by any one with the intent of obtaining for himself or another a pecuniary gain, or to inflict injury upon another, is punishable as follows:
>
> "1. When the instrument is a private instrument, with imprisonment in the penitentiary up to five years, besides which a fine not exceeding three thousand marks may be imposed.

"2. When the instrument is a public instrument, with imprisonment in the penitentiary for a term not exceeding ten years, besides which a fine of from one hundred and fifty to six thousand marks may be imposed.

"In case of mitigating circumstances imprisonment in the common jail will take place, which, in the case of forgery of a private instrument, shall be not less than one week, and in case of forgery of a public instrument, not less than three months.

"In addition to the imprisonment, a fine not exceeding three thousand marks may be imposed.

"Par. 270. It is treated as equivalent to forgery of an instrument in case anybody makes use of any forged or altered document, knowing the same to be forged or altered, with intent to deceive.

"Par. 146. Whoever counterfeits inland or foreign coin or paper money for the purpose of using such counterfeited money as genuine or otherwise to put it in circulation; or who, with like intent, gives to genuine money, by alteration made upon the same, the appearance of higher value, or gives to invalidated money the appearance of money still current, shall be punished with imprisonment in the penitentiary for not less than two years. Police surveillance is also admissible. In the case of mitigating circumstances imprisonment in the common jail may be provided.

"Par. 149. Certificates of indebtedness made payable to the holder, bank notes, stock certificates or preliminary certificates or receipts taking their place, as well as coupons and dividends or renewal certificates thereto belonging, which may be issued by the Empire, the North German Confederation, a state of the Confederation, or a foreign state, or by any other community, corporation, company or private person authorized to issue such papers, are deemed equivalent to paper money.

"Par. 147. The same penalty extends to all persons who circulate the money counterfeited or altered by them with the above mentioned intent, and also to such persons who obtain counterfeited

> or altered money and either utter the same or bring the same from abroad with the intent of circulating the same."

Under either our American or the foreign law the crimes charged, therefore, are extraditable offenses; they were properly set forth in the complaint; the commissioner duly acquired jurisdiction to issue a warrant and hear the case, and the District Court was right in refusing to liberate the prisoner.

In conclusion we beg to say that international treaties of this character have been invariably construed by this Honorable Court in a spirit of fairness toward the foreign government, and in extradition treaties in particular this court has always held that technicalities should be excluded as far as possible in order that full justice may be done.

In re Herres, 33 Fed., 165, Mr. Justice BREWER has said:

> "Finally I might observe, with reference to these extradition proceedings, that the substance, and not the form, should be the main object of inquiry, and that they should not be conducted in any technical spirit with a view to prevent extradition. While the courts should review the proceedings to see that no extradition is consummated upon a mere pretext, or to subserve private malice, yet if it appears that a crime has been committed, and probable that the accused has fled to this country for refuge, then a spirit of fairness, expecting that the foreign country will treat extradition proceedings from this country in the same spirit, requires that we act reasonably and justly, having reference more to the substance than to the form of the proceedings."

In view of the foregoing we respectfully submit that the order of the District Court discharging the writ of

habeas corpus should be affirmed, that the prisoner may be delivered up to the authorities of the demanding government under the warrant heretofore issued by the Department of State and now in the hands of the agents of the Kingdom of Prussia.

Respectfully submitted,

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